

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION
TO APPROVE CLASS-ACTION SETTLEMENT**

As directed by this Court in an order dated August 17, 2015, and pursuant to Rule 23 of the Federal Rules of Civil Procedure, the plaintiffs submit this memorandum in support of the parties' joint motion for approval of this putative class-action lawsuit. The plaintiffs respectfully submit that the proposed settlement readily satisfies the legal standards governing approval of class-action settlements because the settlement grants the plaintiffs the relief they sought in the complaint as well as significant additional relief not specifically sought in the complaint.

I. DESCRIPTION OF THE CASE AND THE PROPOSED SETTLEMENT

The plaintiffs in this case, filed in December 2014, are individuals who have relatives buried on Hart Island, which is New York City's potter's field and is the final resting place for as many as one million people. In their complaint, the plaintiffs sued New York City and challenged a City policy that barred them from visiting the gravesites of family members buried on Hart Island. The complaint sought injunctive relief that would allow the family members to visit the Hart Island gravesites of their family members and sought attorneys' fees; it did not seek any monetary damages. *See* Complaint, *Lusero v. City of New York*, 14 Civ. 9533 (filed Dec. 3, 2014) (attached as Exhibit B to Affirmation of Christopher T. Dunn (Aug. 26, 2015)).

After a brief extension of time to respond to the complaint, the City filed an answer in January 2015. *See* Answer, *Lusero v. City of New York*, 14 Civ. 9533 (filed Jan. 23, 2015) (attached as Exhibit C to Dunn Affirmation). At the same time, it informed the plaintiffs that it

was interested in attempting to settle the case. *See* Dunn Affirmation ¶ 4. The parties then engaged in extensive and detailed settlement negotiations for the next several months. *See id.*

In early July 2015 the parties were able to reach a final agreement about a proposed settlement, a copy of which is attached as Exhibit A to the Dunn Affirmation. The proposed settlement includes the following significant details:

1. The City agreed to provide gravesite visits for a wide range of family members starting in July 2015. *See* Proposed Settlement ¶1; Stipulation and Order Regarding Certification of Class Action ¶ 1 (July 23, 2015). Family members will be entitled to bring up to four guests and will be allowed to bring larger groups of guests if they can be accommodated. *See id.* During their visits, family members or guests can leave mementos at gravesites, including flowers without vases, small stuffed animals, photographs, prayer cards, small flags, and blankets and can also seek to leave other mementos subject to prior approval. *See* Proposed Settlement ¶ 12.
2. Gravesite visits will take place once a month on a Saturday or Sunday, with the City providing ferry service to Hart Island. Each visitation day will include two two-hour visit periods, during which up to 25 family members and guests will be able to visit, for a total of 50 visitors on each visitation day. *See* Proposed Settlement ¶¶ 1-4. After the first year of visits is completed, the parties will confer in good faith to determine whether the frequency of visits should be changed in light of the demand for visitation. *See id.* ¶ 18.
3. The City will operate an on-line and telephone system by which people will be able to schedule visits. *See* Proposed Settlement ¶¶ 6-7.

4. The City can require visitors to sign a liability waiver and, in light of the fact that the Department of Correction currently runs Hart Island, can use uniformed DOC employees to act as escorts and has reserved the right to search visitors and to bar electronic devices. *See Proposed Settlement* ¶¶ 5, 9, 11.
5. The City must maintain a publicly accessible database to allow members of the public to locate persons buried on Hart Island, and that information must be accessible within 30 days of the person's burial. *See Proposed Settlement* ¶ 13. It also must post on the DOC website the substance of the proposed settlement. *See id.* ¶ 16.
6. The City will provide detailed quarterly reports to the plaintiffs about visitation activity (requests and actual visits) each month during the quarter through the first quarter of 2018. *See Proposed Settlement* ¶ 17.
7. The settlement provides for a procedure by which the parties can attempt to resolve disputes about compliance and by which the plaintiffs can seek judicial relief to enforce the terms of the settlement if necessary. *See Proposed Settlement* ¶ 20.
8. The settlement remains in place until December 1, 2018. Should the plaintiffs determine at that time that the City is not providing sufficient access to gravesites on Hart Island, the settlement provides that nothing in the settlement bars them from filing a new case. *See Proposed Settlement* ¶ 22.
9. The proposed settlement provides that the plaintiffs are prevailing parties for purposes of their claim for attorneys' fees and costs and provides that the parties will work in good faith to resolve that claim once the settlement is approved. *See Proposed Settlement* ¶ 23.

10. The proposed settlement includes a stipulation about certification of a proposed class that includes a wide range of family members. *See* Proposed Settlement ¶ 24.
11. The proposed settlement gives the plaintiffs immediate relief because the City has agreed to be bound by its terms during the period this Court is reviewing it. Should the Court not approve the settlement, it provides that the parties will make good-faith efforts to modify the settlement to allow it to be approved. Finally, if the parties are unable to do so, the settlement provides that it is null and void and that the plaintiffs can proceed with the case. *See* Proposed Settlement ¶¶ 25-26.

II. THE PROPOSED SETTLEMENT SATISFIES THE STANDARDS OF RULE 23.

The standards governing District Court review of proposed class-action settlements are well-established. As the Second Circuit has explained,

A court may approve a class action settlement if it is fair, adequate, and reasonable, and not a product of collusion. A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement. A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery. We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context.

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) (citations and internal quotations omitted). In assessing the fairness of the settlement's terms, the Second Circuit has identified nine factors to consider:

(1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of

reasonableness of the settlement fund in light of the best possible recovery, (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 117 (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)).

The Settlement Is Fair- The most important factor in assessing a proposed settlement is whether it is fair to the class members, a determination that ultimately turns on comparing the terms of the settlement against the relief that might have been obtained had the case been litigated, factoring in the uncertainties of litigation (including the prospect of the plaintiffs losing or having relief substantially delayed). Under this standard, the proposed settlement plainly is fair and adequate.

As an initial matter, this case does not present the issue that typically looms large in District Court review of proposed class-action settlements: damages for class members. This case sought only injunctive relief, so damages were never at issue and are not now at issue.

Rather, this case was entirely about injunctive relief and sought one specific form of injunctive relief, namely the right to visit the gravesites of family members buried on Hart Island. *See* Complaint at 13 (Prayer for Relief paragraph 5). Given that, assessing the adequacy of the proposed settlement is relatively straightforward because the plaintiffs secured that right in full. Moreover, they secured additional and important relief that went beyond what they specifically sought in their complaint (much less could have obtained through litigation): the right to visit specifically on weekends, with a mix of Saturday and Sunday visitation days; the right to bring guests; the right to leave mementos at gravesites; the right to have a reservation system; the right to have the City maintain an up-to-date database of burials on Hart Island; and the right to ongoing reporting by the City about compliance with the terms of the settlement. Because it

provides the plaintiffs with the relief they sought as well as additional relief (including immediate implementation as the fairness process proceeds¹), the proposed settlement is fair and adequate.

The Negotiation Process Was Fair- As should be apparent from the favorable terms of the settlement for the plaintiffs, the negotiation process here was not infected by any collusion or other improper dealings between counsel for the parties. To the contrary, the negotiations were entirely at arm's length. *See* Dunn Affirmation ¶ 4.

As for the experience of counsel, plaintiffs' counsel the New York Civil Liberties Union has decades of experience litigating civil-rights challenges against New York City, the federal government, and other government defendants, and lead counsel Christopher Dunn has nearly 30 years of civil-rights litigation experience, including serving as lead counsel in other class-action lawsuits. *See* Dunn Affirmation ¶¶ 6-7. Similarly, the defendant is represented by the New York City Law Department, which vigorously defends City agencies, and the lawyer supervising the City's defense, Jonathan Pines, has substantial experience and serves as the deputy chief of the General Litigation Division of the Law Department. *See* Dunn Affirmation ¶ 10.

A final process factor the courts consider is the extent of discovery in the case. Here, settlement discussions started and concluded before any discovery had taken place, but it is important to note that the City admitted in its answer the central fact that might have been disputed: that it had a policy of not allowing gravesite visits. *See* Answer ¶ 2. Given this, given that this case did not involve any damage claims, and given that the plaintiffs secured more relief

¹Gravesite visits have already taken place (on July 18 and August 8). *See* Dunn Affirmation ¶ 5.

than the complaint even sought, the lack of discovery in this case does not detract from the fairness of the process that led to the settlement.²

CONCLUSION

For all the foregoing reasons, the plaintiffs respectfully urge this Court, following the fairness process prescribed by Rule 23, to approve the proposed settlement in this matter.

Respectfully submitted,

/s/ Christopher Dunn

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²Under the settlement, the parties have agreed the plaintiffs are prevailing parties for purposes of an award of attorneys' fees and costs under 42 U.S.C. § 1988. All fees and costs recovered from the City will be paid to the NYCLU, which is representing the plaintiffs on a *pro bono* basis. Neither the NYCLU lawyers representing the plaintiffs in this case nor any other employee of the NYCLU will receive any portion of fees or costs paid to the NYCLU. *See* Dunn Affirmation ¶ 9.